

EXHIBIT D

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**MOTION IN LIMINE NO. 4: CISCO'S
MOTION TO EXCLUDE UNTIMELY
DISCLOSED NON-INFRINGEMENT
THEORY**

**UNREDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED**

Judge: Hon. Beth Labson Freeman

1 **I. INTRODUCTION**

2 Cisco respectfully moves *in limine* under Fed. R. Civ. P. 26(e) to preclude Arista from
3 reliance at trial on a non-infringement theory that was not timely disclosed to Cisco. Despite
4 ample opportunity throughout more than a year of discovery, Arista waited until weeks *after the*
5 *close of fact discovery* to disclose a new non-infringement theory in its technical expert's rebuttal
6 report. Arista's undue delay in disclosing a theory of non-infringement prejudices Cisco because
7 Cisco cannot properly prepare to cross-examine Arista's fact witnesses regarding this issues at
8 trial. Therefore, the Court should confine Arista to its interrogatory responses prior to discovery
9 cutoff and exclude Arista's untimely non-infringement opinion.

10 **II. LEGAL STANDARD**

11 Rule 26(e)(1) of the Federal Rules of Civil Procedure requires parties to timely
12 supplement their interrogatory responses if the prior responses are incomplete or incorrect. This
13 duty to supplement applies to contention interrogatories. *See B-K Lighting, Inc. v. Vision3*
14 *Lighting*, 930 F. Supp. 2d 1102, 1136 (C.D. Cal. 2013) (excluding expert testimony that disclosed
15 theories that had not been included in the party's responses to contention interrogatories). A party
16 must exercise "due diligence" in supplementing its disclosures, *SPX Corp. v. Bartec USA, LLC*,
17 2008 U.S. Dist. LEXIS 29235, at *22 (E.D. Mich. Apr. 10, 2008), and supplementation should
18 occur "during the discovery period." Fed. R. Civ. P. 26 Advisory Committee's Note to 1993
19 Amendments. Rule 37(c)(1) "mandates that a party's failure to comply with . . . the supplemental
20 disclosure obligations under [Rule] 26(e) results in that party being precluded from use" of the
21 withheld information. *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541, 544 (N.D. Cal. 2009); *see*
22 *also Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (preclusion
23 of evidence under Rule 37(c)(1) is "automatic" and "self-executing" unless an exception applies).
24 To avoid preclusion, a party who violates Rule 26(e) bears the burden of showing that the
25 violation was substantially justified or harmless. *Id.* at 1101.

1 **III. DR. JOHN BLACK'S UNTIMELY DISCLOSED NON-INFRINGEMENT THEORY**
 2 **SHOULD BE EXCLUDED**

3 On March 26, 2015, Cisco served Arista with Interrogatory 10, requesting that Arista
 4 “[e]xplain in detail all factual and legal bases for any contention by You that You have not
 5 infringed Cisco’s copyrights in Cisco IOS, including Cisco IOS CLI, and Cisco IOS
 6 Documentation.” Arista responded to this interrogatory on April 30, 2015 and served five
 7 additional supplemental responses to this interrogatory, up until the last day of fact discovery,
 8 May 27, 2016. Jenkins Decl., Exh 5. Arista’s responses included dozens of non-infringement
 9 theories spanning more than 200 pages. *Id.*

10 Then, on June 17, 2016, three weeks after the close of fact discovery, Arista served the
 11 rebuttal expert report of Dr. John Black, which contained a new, previously-undisclosed, theory of
 12 non-infringement. Dr. Black’s new theory is that the asserted and accused multi-word commands
 13 are supposedly dissimilar if you look not just at the commands as asserted by Cisco, but also at the
 14 alleged “full syntax” of the commands “including all optional parameters, of the asserted and
 15 accused command abstractions.” Jenkins Decl., Exh. 11, Black Rebuttal Report at ¶ 136. Dr.
 16 Black relies on this non-infringement theory not just for his non-infringement opinion, but also to
 17 support his opinions regarding fair use. *Id.*

18 Arista did not disclose this non-infringement theory in its interrogatory responses, and did
 19 not seek leave to amend those responses. Allowing Arista’s experts to opine at trial on this theory
 20 would unfairly prejudice Cisco. Cisco conducted discovery based on the understanding that
 21 Arista’s non-infringement defenses were limited to what Arista disclosed in its interrogatory
 22 responses. Cisco had no chance to conduct written discovery or fact depositions on the new non-
 23 infringement theory because fact discovery closed three weeks before Arista disclosed this
 24 opinion. Therefore, the Court should strike all portions of Dr. Black’s Rebuttal report that present
 25 arguments or rely on this untimely disclosed theory, including paragraphs 95, 136, 138, 177, 178,
 26 footnote 31 and Appendix N. Jenkins Decl., Exh. 11. *See Apple, Inc. v. Samsung Elecs. Co.*, No.
 27 11-CV-01846-LHK, 2012 WL 3155574, at *5 (N.D. Cal. Aug. 2, 2012) (striking portions of
 28

1 expert reports containing information when late disclosure prohibited Apple from conducting
2 additional fact discovery regarding new and previously undisclosed theories).

3 **IV. CONCLUSION**

4 For the foregoing reasons, Cisco respectfully requests that the Court exclude the untimely
5 disclosed non-infringement theory as described in this Motion.

6
7 Dated: September 16, 2016

Respectfully submitted,

8 /s/ John M. Neukom

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